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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951.

No. 136

AIR TRANSPORT ASSOCIATES, INC.,
Petitioner,

v.

CIVIL AERONAUTICS BOARD
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Air Transport Associates, Inc., petitioner, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on February 18, 1952, (R. 162) by which order a petition for review, (R. 1-29) of order of the Civil Aeronautics Board was dismissed.

Opinions Below

The opinion, (R. 38-68) separate opinion by Member Jones (R. 68-83) and the supplemental opinion and order

of the Civil Aeronautics Board[1] (R. 29-32) are not reported. The order (per curiam) of the United States Court of Appeals for the District of Columbia Circuit (R. 162) is not reported.

Jurisdiction

The order of the United States Court of Appeals for the District of Columbia Circuit was entered on February 18, 1952, (R. 162). This court extended the time to and including June 17, 1952, for filing this petition (R. 165). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and section 1006(f) of the Civil Aeronautics Act, as amended, 52 Stat. 1024, 49 U.S.C. 646(f).

Questions Presented

The Board in its opinion of September 29, 1950, (R. 38-68), after extensive hearings and after applying the requisite standards as authorized by Congress (sec. 401(d)(1)) of the Civil Aeronautics Act, as amended, 52 Stat. 987, 49 U.S.C. 481(d)(1)[2] found in effect that Alaska Airlines, Inc., did not qualify for a certificate of public convenience and necessity authorizing it to operate regularly and receive government mail subsidy[3] to defray its operations; and directed the entry of an order providing, among other things, that Alaska Airlines, Inc., and Pacific Northern Airlines, Inc., be issued certificates of public convenience and necessity, which certificates were issued (R. 33-35).

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[1] Hereinafter referred to as "the Board".

[2] This statute provides: "The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

[3] Sec. 406, Civil Aeronautics Act of 1938, as amended, 52 Stat. 998, 49 U. S. C. 486.

This opinion was forwarded to the President of the United States for approval,[4] who, according to the supplemental opinion and order (R. 29-32), directed the issuance of certificates of public convenience and necessity to Pacific Northern Airlines, Inc., as recommended by the Board, and, in addition, directed that a certificate of public convenience and necessity be granted to Alaska Airlines, Inc. An order to this effect was accordingly made by the Board without further findings (R. 34-35).

Although petitioner filed with the Board an application for a certificate of public convenience and necessity on May 9, 1949, (R. 13, 27), such application has never been considered by the Board, although it was not until September 29, 1950, that its opinion was rendered (R. 36).

The questions presented are:

1. When an administrative agency does not, as expressly directed by statute, file in court a transcript of the record upon which an order sought to be reviewed was entered in a case when the validity of such orders is challenged because of the lack of regularity of the proceedings, and because of the lack of substantial evidence, may a Circuit Court of Appeals properly dismiss the petition without having available for inspection the entire record of the challenged proceeding?

2. When mutually exclusive applications for certificates of public convenience and necessity have been filed with an administrative agency by different carriers for identical

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[4] Sec. 801, Civil Aeronautics Act of 1938, as amended, (52 Stat. 1014, 49 U. S. C. 601) provides, in part:

". . . The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. . . ."

service over the same route, may that agency grant certificates to some of the applicants without considering all other such pending mutually exclusive applications?

3. Whether, in the absence of a statute expressly authorizing the President to order the issuance of a certificate of public convenience and necessity to an air carrier to engage only in "overseas air transportation"[5] in a case not involving "foreign air transportation",[6] did the Board have the power to issue such certificate at the direction of the President, although it had previously determined as an independent body of experts, entirely free from executive control or influence that the carrier did not meet the standards prescribed by Congress as a prerequisite to the issuing of such certificate?

Statutes Involved

The pertinent statutes involved are set forth in the Appendix.

Summary of the Matter Involved

Petitioner, a "noncertificated" air carrier, has been engaged since July, 1948, in transporting cargo and passengers between Seattle, Washington, and Alaska. On March 9, 1948, the Board instituted a proceeding to determine the adequacy of air cargo service performed by certificated air-

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[5] The transportation in question was between Seattle, Washington, and points in Alaska, and constituted "overseas air transportation"; defined by Sec. 1 (21)(b) of the Civil Aeronautics Act (49 U. S. C. 401) as transported between:

> ". . . a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; . . ."

[6] Sec. 1(21)(c) of the Civil Aeronautics Act, 49 U. S. C. 401, defines "foreign air transportation" as transportation between ". . . a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation. . . ."

lines between the Territory of Alaska and the continental United States. In this proceeding, the Board consolidated certain applications for certificates of public convenience and necessity filed by other airlines. Petitioner moved to intervene in that proceeding on November 2, 1948, which motion was not granted until after the close of the hearings in December, 1948. Petitioner filed an application for a certificate of public convenience and necessity with the Board on May 9, 1949, 16 months before the Board acted upon the application of Alaska Airlines, Inc., and Pacific Northern Airlines, Inc. on September 29, 1950 (R. 38-68). This application was "mutually exclusive" with the applications of Pacific Northern Airlines, Inc., and Alaska Airlines, Inc., as that term is used in *Ashbacker Radio Corp.* v. *Federal Communications Comm.*, 326 U. S. 327, 90 L. Ed. 108, 110. However, the Board has not yet considered petitioner's application although the Board is directed by statute to dispose of such applications as speedily as possible,[7] and petitioner has unsuccessfully requested early action thereon.

Petitioner asked the court below to set aside the orders of the Board (R. 1-28), granting certificates of public convenience and necessity to Pacific Northern Airlines, Inc., and Alaska Airlines, Inc. (R. 33-35), and to set its application for a certificate of public convenience and necessity for early hearing. Among the grounds urged for reversal of the Board's order was that the Board's action was not based upon substantial evidence in the record (R. 25). Notwith-

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[7] Sec. 401(e) of the Civil Aeronautics Act, 52 Stat. 987, 49 U. S. C. 481(e), provides: "(e) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible."

standing the statute requires the Board to certify and file in the court below the transcript of the record upon which the order complained of was entered,[8] and directs these applications be set for public hearing and disposed of as speedily as possible, the Board neglected to file a complete transcript of the record, but attempted to file an "abbreviated record", which it lodged with the clerk of the court below. Petitioner objected to the filing of the "abbreviated record" upon the ground that the Board had no right to "hand pick" only those portions of the record it desired the court to consider when passing upon the Board's Motion to Dismiss, as the petition for review is based in part upon the lack of substantial evidence to support the orders being reviewed, and in part upon the lack of regularity of the administrative proceedings.

Certificates of public convenience and necessity are only issued in accordance with the standards prescribed by the Civil Aeronautics Act. That Act does not confer authority upon the Board to base the issuance of a certificate of public convenience and necessity solely upon "national defense" reasons (R. 74-75). It was not the intention of Congress to place upon the Post Office Department the burden of paying mail subsidy to defray the expense of air routes established solely for the purpose of national defense, as was done by the Board here in granting a certificate of public convenience and necessity to Alaska Airlines, Inc. Nothing in the Civil Aeronautics Act authorizes this.

If Section 801 of the Civil Aeronautics Act, requiring the President to approve a certificate for overseas transportation is to be construed as conferring upon him the right to order the issuance of such a certificate when, as here, such

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[8] Sec. 1006(c) of the Civil Aeronautics Act, as amended, 52 Stat. 1024, 49 U. S. C. 646, provides: "(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered."

procedure violates the economic standards provided in the Act, this is a misconstruction of the statute. While the court below rendered no opinion, nevertheless in reaching its conclusion, it is apparent that it took this view of the law, unless it felt that the President had inherent powers such as he erroneously asserted in the Steel Seizure Cases. In either event, the action of the court below on this important point should be reviewed by this court and a rule of law established so the Civil Aeronautics Board, as well as the President, will be aware of their respective functions in these matters; and future action will not violate, as here, the rights of others.

The petition for review does not challenge the power of the President to approve or disapprove the decision of the Board in this case, dated September 29, 1950 (R. 36), but it is petitioner's position that the President's power with respect to this "overseas air transportation" is limited to approving or disapproving this decision of the Board because the statute provides that the issuance of any certificate "shall be subject to the approval of the President" (49 U. S. C. 601). The President's action in directing (R. 30) that Alaska Airlines, Inc., be issued a certificate, notwithstanding the finding by the Board that it did not meet the standards and requirements prescribed by statute (R. 36-83) is beyond his constitutional powers. The only authority vested in the President with respect to "overseas air transportation" as distinguished from "foreign air transportation" is that contained in Section 801 of the Civil Aeronautics Act (49 U. S. C. 601) which makes the issuance or denial of a certificate covering such transportation subject to the President's approval. It does not vest in the President the authority to *grant* a certificate of public convenience and necessity under the provisions of Section 401(d)(1) of the Civil Aeronautics Act (49 U. S. C. 481(d)(1)). Under the commerce clause of the Constitution,

only Congress has authority to regulate commerce. This it has done by delegating such authority to the Board with respect to overseas air transportation.

No formal executive order was ever issued by the President directing the granting of a certificate of public convenience and necessity to Alaska Airlines, Inc., under his general or executive powers. If issued, such executive order would be clearly beyond the authority and power vested in the President by the Constitution, and would violate that provision of the Constitution which gives only to Congress the right to regulate the air commerce here under consideration. For like reason, the action of the President here, being in excess of his powers under the Constitution, should be ignored.

Petitioner here is only asking the court to review the orders of the Board herein complained of, as authorized by Section 1006 of the Civil Aeronautics Act (49 U. S. C. 646). It is not asking the court to review any order of the President. In reviewing the orders of the Board, however, petitioner asks the court to set aside such orders issued at the President's direction when he told the Board to issue a certificate to Alaska Airlines, Inc. Such action was not binding on the Board as it was beyond his constitutional powers and was void *ab initio*.

Petitioner does not take the position here that the record made before the Board is insufficient to support the President's action, because the record before the court did not and does not indicate whether or not the Board's entire record in this case was ever sent to the President, ~~either~~ at the time the decision of the Board, dated September 29, 1950, was ~~ever~~ submitted for his approval. The supplemental opinion and order only states that the decision of the Board was submitted to the President for his approval, and therefore if this case is to be decided without the whole

record, we must assume that *only* the decision of the Board was sent to the President for action. Consequently, petitioner is not urging here that the record made before the Board is insufficient to support the President's action, because it is only the orders before the Board which are being reviewed here and not the action of the President.

As in the *Steel Seizure* cases, there is no statute that authorizes the President to take the action which he did. Here, as in the *Steel Seizure* cases, attempt was made to justify the action of the President upon the ground of national defense;[9] but, as in the *Steel Seizure* cases, there is no statute authorizing him to take the action which he did; and as in the *Steel Seizure* cases, the order cannot properly be sustained as an exercise of the President's military power as Commander-in-Chief of the armed forces.

Here, as in the *Steel Seizure* cases, the plan Congress adopted in the Civil Aeronautics Act did not provide for the President to step over the bounds fixed by Congress, and the statute here[10] did not authorize the President to

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[9] R. 30. On May 18, 1951, the President advised the Board that after taking into account all of the considerations and factors relating to this matter peculiarly within the scope of the Executive, particularly the need for air transport services to Alaska arising directly out of *national defense* activities, and the direct contribution which the fullest development of Alaska would make to *the national defense*, he had concluded that the Board's decision should be approved with the following changes:

1. Pacific Northern Airlines, Inc., should be authorized to serve Portland, Oreg., as a co-terminal point with Seattle, Wash.; and

2. Alaska Airlines, Inc., should be granted a route from the co-terminal points Seattle, Wash., and Portland, Oreg., to Fairbanks, Alaska, carrying passengers, property, and mail. The certificate should be temporary, expiring at the same time as the certificates of Northwest Airlines, Inc., and Pacific Northern Airlines, Inc., for operations between the United States and Alaska. (Italics supplied.)

[10] Section 801 of the Civil Aeronautics Act, 1938, as amended (52 Stat. 1014, 49 U. S. C., 601) provides:

"The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained

direct the issuance of a certificate of public convenience and necessity after the Board has determined, according to the standards prescribed by Congress, that a carrier does not meet such standards. The President cannot change the facts as found by the Board although he may disapprove the Board's findings. But his right to so disapprove does not carry with it the power to make independent findings which are contrary to the economically based findings of the Board.

The action taken by the President in the instant case is similar to the erroneous belief prevailing in some quarters prior to this Court's recent decisions in the *Steel Seizure* cases that the President possessed certain "inherent and implied war emergency or plenary powers," which were not prescribed by statute or conferred upon him by the Constitution, as he did in the "*Steel Seizure* cases" (*Youngstown Sheet & Tube Co.* v. *Sawyer*, 72 S. Ct. 863, and *Sawyer* v. *Youngstown Sheet & Tube Co.*) where this Court, on June 2, 1952, held that the order of seizure cannot properly be sustained as an exercise of any of the President's powers, including his military power as commander-in-chief of the armed forces. The President grounded his action on "national emergency activities" (R. 30). Here, as in that case:

> "The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President . . ." (72 S. Ct. 863 at p. 867.)

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in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President."

Reasons for Allowance of the Writ

1. The United States Circuit Court of Appeals for the District of Columbia Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The United States Circuit Court of Appeals for the District of Columbia Circuit has decided a question of general importance and of substance relating to the construction of a statute of the United States involving the application of the Constitution of the United States that has not been, but should be, settled by this Court.

3. The order of the United States Circuit Court of Appeals for the District of Columbia Circuit is inconsistent with and probably conflicts with the opinions of this Court rendered June 2, 1952, in the cases of *Youngstown Sheet & Tube Co.* v. *Sawyer,* and *Sawyer* v. *Youngstown Sheet & Tube Co.,* 72 S. Ct. 863 and *Ashbacker Radio Corp.* v. *Federal Communications Comm.,* 326 U. S. 327.

These reasons are shown in petitioner's brief, filed herewith.

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Honorable Court directed to the United States Court of Appeals for the District of Columbia Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings had in the case numbered and entitled in its Docket 11,118 (April Term 1951) Air Transport Associates, Inc. *vs.* Civil Aeronautics Board, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the order herein of the said United States Court of Appeals

for the District of Columbia Circuit be reversed by this court, and for such other, further, or different relief as to this court may seem proper.

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CIVIL AERONAUTICS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

No opinion was rendered by the United States Court of Appeals for the District of Columbia Circuit as this matter was disposed of by per curiam order (R. 162).

Jurisdiction

Reference is made to jurisdictional statement in the petition.

Statement of the Case

Reference is made to the "Summary of the Matter Involved" in petition.

Specification of Errors

1. The Court of Appeals erred in dismissing this complaint, because

a. No findings were made by the Board as prescribed by 49 U. S. C. paragraph 481(d), which is essential to the granting of a certificate of public convenience and necessity.

b. The Board found Alaska Airlines, Inc. to not meet the standards prescribed by the Civil Aeronautics Act as a prerequisite to granting of a certificate of public convenience and necessity.

c. When "Overseas air transportation" only is involved, after an agency determines that a carrier did not meet the standards prescribed by Congress as a prerequisite to the issuing of a certificate of public convenience and necessity, and the President for asserted reasons of "National Defense" later directs the agency to issue a certificate and the agency pursuant to such directions and without any further findings issues a certificate, the Agency's action is void and should be set aside.

d. When mutually exclusive applications for certificates of public convenience and necessity have been filed by different carriers for identical service the agency's action in granting certificates to some of the applicants without considering all other pending mutually exclusive applications is contrary to law.

e. The Court below misconstrued Section 801 of the Civil Aeronautics Act (49 U. S. C. 601).

f. There is no Act of Congress or provisions of the Constitution authorizing the issuance of a certificate of public convenience and necessity by direction of the President when the carrier receiving the certificate has been found to not meet the standards prescribed by Congress as a prerequisite to receiving one.

g. The orders sought to be reviewed contravene the following provisions of Section 10(e) of the Administrative Procedure Act (5 U. S. C. 1009(e)):

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence * * *."

(h) The hearings before the Board constitute a lack of procedural due process of law.

(i) The finding of the Board that Pacific Northern was fit and able properly to perform such transportation was not supported by substantial evidence, and hence was unlawful.

(j) The orders here reviewed violate the "Declaration of Policy" prescribed by section 2(c) of the Civil Aeronautics Act (49 U.S.C. 402 (c)).

(k) As all questions touching on the regularity and validity of proceedings of the Board pertaining to Alaska Airlines, Inc., are open to review by the Court, its responsibility can be discharged only by a review of the entire record of the proceeding before the Board in this case, the regularity and validity of which proceeding is herein challenged.

(l) The orders of the Board herein challenged do not, as required by Section 8(b) of the Administrative Pro-

cedure Act (5 U.S.C. 1007(b))[11] include a statement of the findings and conclusions as well as the reasons or basis therefor upon all the material issues of fact, law, or discretion presented on the record with respect to Alaska Airlines, Inc.

(m) The only delegation of authority by Congress, which alone can regulate commerce (Article I, Section 8 of the Constitution) is contained in Section 401 of the Civil Aeronautics Act giving the Board as an independent body of experts entirely free from executive control the right to act in accordance with that section.

Point 1

THE COURT BELOW ERRED IN DISMISSING THE PETITION WHICH SOUGHT REVIEW BECAUSE OF THE LACK OF REGULARITY OF THE PROCEEDINGS BEFORE THE BOARD AND THE LACK OF SUBSTANTIAL EVIDENCE WHEN THE COURT DID NOT HAVE THE ENTIRE RECORD OF THE PROCEEDINGS BEFORE IT, ALTHOUGH THE STATUTE REQUIRES A TRANSCRIPT OF THE RECORD BE FILED IN COURT.

Section 1006(c) of the Civil Aeronautics Act (49 U.S.C. 646[illegible]) provides that upon filing petition, the Board shall thereupon certify and file in the court a transcript of the record upon which the order complained of was entered. This clearly contemplates the filing of the entire record and not an "abbreviated record" as the Board here unsuccessfully sought to file (R-137). This Court said in American

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[11] 5 U. S. C. 1007(b) provides: "The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

Power Company vs. Securities and Exchange Commission, 325 U. S. 385, at page 392:

> "• • • Apparently it was not satisfied that the filing of an abbreviated transcript furnished a basis for affirmance. The Commission, without inordinate delay or additional expense, might have filed the full transcript of the proceedings before it and obtained the judgment of the court on the adequacy of the petition. With that we are not called upon to examine the merits of the Commission's contentions or to reverse the decision denying the motion to dismiss, or that denying the motion to dismiss or affirm • • •."

It is petitioner's position that all issues stemming from the petition filed herein are open for review.

As all questions touching on the regularity and validity of proceedings of the Board pertaining to Alaska Airlines, Inc. are open to review by the Court, its responsibility can be discharged only by a review of the entire record of the proceeding before the Board in this case, the regularity and validity of which proceeding is herein challenged. As the entire record of the proceeding before the Board was not before the Court below when it dismissed the petition, this court should take jurisdiction and reverse the lower court.

Point 2

THE COURT ERRED IN DISMISSING THIS CAUSE AND NOT SETTING ASIDE THE ORDERS OF THE BOARD GRANTING CERTIFICATES OF CONVENIENCE AND NECESSITY TO PACIFIC-NORTHERN AIRLINES, INC., AND ALASKA AIRLINES, INC., BECAUSE THE BOARD DID NOT CONSIDER PETITIONER'S APPLICATION FOR CERTIFICATE WHICH HAD BEEN PENDING FOR OVER SIXTEEN MONTHS.

Petitioner is Entitled to a Hearing on Its Application for a Certificate of Public Convenience and Necessity and Comparative Consideration with Other Applicants Seek-

ing to Engage in Substantially Similar Air Transportation.

Petitioner requests in its petition for review herein that the Civil Aeronautics Board be directed to set the matter of its application for a certificate of public convenience and necessity for early hearing. Its application is mutually exclusive of those that were consolidated in the *United States-Alaska Service Case,* supra, but its application was not consolidated with the others in that proceeding. Its application was filed with the Board after the close of the hearings before the Board but more than two years before the Board on May 24, 1951 issued its order herein sought to be reviewed (R. 29).

The situation here is similar to that existing in the case of *Northwest Airlines, Inc.* v. *Civil Aeronautics Board,* 194 Fed. (2d) 339, where the court stated "the test of mutual exclusiveness because of economical conditions should be as of the time the applications are being considered and an award is being made. * * * Where two bona fide applications are mutually exclusive, it is ordinarily true that one may not be granted without a hearing to both. This fundamental principle of fair play was announced by this Court in *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327.

POINT 3

THE COURT ERRED IN DISMISSING THE PETITION BECAUSE IT SHOULD HAVE REVERSED AT LEAST THAT PART OF THE BOARD'S ORDERS GRANTING A CERTIFICATE TO ALASKA AIRLINES, INC.

Reasons for Granting the Writ

Determination by the Courts of the Distinction between Executive and Regulatory Functions under the Civil Aeronautics Act of 1938 Was Intended by Framers of the Act and the Congress in Adopting the Act.

The drawing of the line between executive action and administrative, quasi-judicial action was considered in connection with the study of the Civil Aeronautics Act of 1938. From the hearings conducted by the Committee on Interstate and Foreign Commerce of the House of Representatives, it appears that the question as to the limitations upon the action of the executive with respect to decisions of the Authority or Board arose several times. The proposal that the disposition of certificates of public convenience and necessity be subject to the approval of the President was left substantially as it appears in Section 801 of the Act under the belief of the Congress and governmental agencies interested that the courts would determine the area of executive function except as to the specific exception. Immunity from judicial review was specifically limited to orders in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of the Civil Aeronautics Act.

The following is from the testimony of Clinton M. Hester, Assistant General Counsel of the Treasury and representative of the Interdepartmental Committee on Civil Aviation, and Fred D. Fagg, Jr., Director of Air Commerce of the Department of Commerce, at the hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives, 75th Congress, 3rd Session (House Report No. 2254):

> "Mr. Halleck: I recognize that, but I was looking at that section in the light of the words contained in section 801, subsection (a), which purports to make the action of the Authority subject to the general direction of the President except as respects those acts that are reviewable by the courts.
>
> "Mr. Hester: Well, we say that the dividing line is purely executive functions; the exercise of purely ex-

ecutive functions, which are not to be reviewable." Id., page 411; April 1, 1938.

* * *

"There (reference is to the reorganization statute of 1932, the Hoover Act) the President of the United States was trusted, or was authorized, to determine what is a regulatory function and what is an executive function.

"Under this bill we leave it to the courts to determine.

"So, Congress has once decided that the President did not need any definition of these terms, as they felt that the regulatory functions and the Executive functions were so well known and so well defined within the decisions that it is not necessary to define them.

"Here we turn it over to the courts."

* * *

"Mr. Halleck. Is it fair to say that this language of subsection (e) 'The terms and conditions, and limitations contained in any permit shall be subject to the approval of the President,' arises out of the fact that they involve foreign operations?

"Mr. Fagg. Yes, sir; and definitely so, and is limited to that." Id., page 412.

The legislative intention appears to have been that there should be judicial review of all matters under the Act except those relating to foreign operation. It is unfortunate that "or" is used instead of "and" in the phrase "overseas or foreign air transportation" included in section 801 of the Act, as the House Committee on Interstate and Foreign Commerce was not only informed as above by the representatives of the government agencies which had studied the matter and collaborated in the drafting of the law, but Mr. Hester testified earlier in the hearings (March 10, 1938):

"In the exercise of its quasi-legislative, or so-called quasi-judicial functions, such as the fixing of rates and *the issuance of certificates authorizing the operation of air lines,* the agency would sit as an administrative

court entirely independent of the executive branch of the Government." Id., page 37, italics ours.

Application of the principles laid down to date means one standard as to citizens applying for certificates of public convenience and necessity authorizing air transportation within the continental United States and another standard as to citizens applying for certificates authorizing air transportation between the continental United States and a territory, with no definition or way of ascertaining the standard in the latter instance. If the findings of the Civil Aeronautics Board are to be disregarded and a carrier found not to meet the requirements of the Act is to be granted a certificate, uniformity of application of legal requirements appear to require some definition and that the selection of such a carrier over other applicants should have a sound relationship to foreign affairs. This important matter should be determined by this court.

IN THE ABSENCE OF A STATUTE EXPRESSLY AUTHORIZING THE PRESIDENT TO ORDER THE ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO AN AIR CARRIER TO ENGAGE ONLY IN "OVERSEAS AIR TRANSPORTATION" IN A CASE NOT INVOLVING "FOREIGN AIR TRANSPORTATION", THE BOARD DID NOT HAVE POWER TO ISSUE SUCH CERTIFICATE AT THE DIRECTION OF THE PRESIDENT, AS IT HAD PREVIOUSLY DETERMINED THAT THE CARRIER DID NOT MEET THE STANDARDS PRESCRIBED BY CONGRESS AS A PREREQUISITE TO THE ISSUING OF SUCH CERTIFICATE.

As stated by Member Jones in his separate opinion (R. 68), the principal issues [12]

"are to be determined in accordance with the Civil Aeronautics Act of 1938, as amended, particularly sec-

[12] He stated the principal issues to be as follows:

"(1) Whether the existing air freight service is adequate and/or whether there is a need for additional service in the transportation of property by the carriers named in the Board's order of investigation; (2) whether additional routes are required by the public convenience

> tions 205(a); 401; 404(a); 801; and 1002(b) . . . In making a recommendation to the President under Section 801, the Board must arrive at a quasi-judicial decision, which, incorporated in an opinion and order, must be delivered to the President prior to publication. This it must do as an independent body of experts entirely free from executive control or influence. 'Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.' " [13]

These issues, in so far as Alaska Airlines was concerned, were answered in the negative by the Board's opinion of September 29, 1950 (R. 36-83) in which it refused to recommend the issuance of a certificate of public convenience and necessity to this carrier. As was stated by Member Jones (R. 74):

> "The Civil Aeronautics Act does not authorize the Board to make new route awards based solely on national defense requirements. The phrase 'and the national defense' as used in the Declaration of Policy must be read in context. It does not stand alone. It must be considered together with such phrases as 'sound economic conditions in [air transportation],' 'economic and efficient services,' and 'sound development of air transportation'.
>
> "The Board adopted this view early in its history. In a letter addressed to Congress through Senator Walter F. George in 1942, it made abundantly clear its belief that Congress had not intended to direct the Board to achieve national defense objectives [14] un-

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and necessity; and (3) if any additional routes are required by the public convenience and necessity, which applicant or applicants should be selected to perform such services."

[13] 333 U. S. at 109, quoting from *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628.

[14] "If the contrary interpretations were adopted, there would be no limit to the national defense projects which carriers might be expected to perform; and the required financial assistance from Post Office appropriations might well be multiplied many times. The Board does not

related to the development of a sound air transportation system."

The Post Office Department took the position that there was no requirement for additional services for the carriage of mail in so far as the Postal Service was concerned (R. 75).

It follows therefore that the order of the Board dated May 24, 1951 (R-29-32) so far as it relates to Alaska Airlines, Inc., and the Certificate of Public Convenience and Necessity issued to Alaska Airlines, Inc. (R-34-35) should have been set aside by the court below.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WARREN E. MILLER,
Attorney for Petitioner,
910 Seventeenth Street, N. W.,
Washington 6, D. C.

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understand that Congress intended to authorize the Board to require air carriers, for example, to build up a large reservoir of aircraft, personnel, equipment, and other facilities greatly in excess of the requirements of a civil air transportation system, to be held virtually in trust or on call for war air-transport purposes. Congress vested in the Board no power by which it might effect such a result, and in the absence thereof, the objective of such a reservoir of planes, equipment, and reserve personnel, and organization could be realized only through the voluntary cooperation of the carriers . . . It normally would not be possible to absorb such a reservoir of aircraft, equipment, and such an organization in a sound air transportation system". (Underscoring supplied.)

Letter from the Chairman of the Civil Aeronautics Board in response to S. Res. 228; S. Doc. 206, Part 2, 77th Cong. 2d Sess., 1942.

APPENDIX A

RELEVANT STATUTORY PROVISIONS

28 U.S.C. 1254(1) provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Sec. 1(21)(c), Civil Aeronautics Act, 52 Stat. 977, 49 U.S.C. 401 provides:

"(21)(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

Sec. 205(a), Civil Aeronautics Act, 52 Stat. 984, 49 U.S.C. 425(a), provides:

"SEC. 205 [*52 Stat. 984, 49 U. S. C. 425*] (a) The Authority is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out such provisions and to exercise and perform its powers and duties under this Act."

"Sec. 401, Civil Aeronautics Act, 52 Stat. 987, 49 U.S.C. 481 provides:

SEC. 401 [*52 Stat. 987, 49 U. S. C. 481*] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: *Provided*, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said

date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier filed such application as provided herein.

Application for Certificate

"(b) Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require.

Notice of Application

"(c) Upon the filing of any such application, the Authority shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority and to such other persons as the Authority may by regulation determine. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority shall dispose of such application as speedily as possible.

Issuance of Certificate

"(d)(1) The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transporta-

tion and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder.

Existing Air Carriers

"(e) (1) If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the Authority, upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided*, That no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the Authority shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.

(2) If paragraph (1) of this subsection does not authorize the issuance of a certificate authorizing the transportation of mail between each of the points between which air-mail service was provided for by the Act of Congress making appropriations for the Treasury Department and the Post Office Department, approved March 28, 1938, the

Authority shall, notwithstanding any other provision of this Act, issue certificates authorizing the transportation of mail, and all other classes of traffic for which authorization is sought, between such points, namely, (A) from Wichita, Kansas, to Pueblo, Colorado, via intermediate cities; (B) from Bismarck, North Dakota, to Minot, North Dakota; (C) from Detroit, Michigan, to Sault Sainte Marie, Michigan, via intermediate cities; (D) from Brownsville, Texas, via Corpus Christi, to Houston to San Antonio, Texas; (E) from Phoenix, Arizona, to Las Vegas, Nevada, via intermediate cities; (F) from Jacksonville, Florida, to New Orleans, Louisiana, via intermediate cities; (G) from Tampa, Florida, to Memphis, Tennessee, via intermediate cities, and from Tampa, Florida, to Atlanta, Georgia, via intermediate cities (which projects have been advertised); and (H) by extension from Yakima, Washington, to Portland, Oregon; and (I) by extension from Grand Rapids, Michigan, to Chicago, Illinois.

Terms and Conditions of Certificate

"(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Authority shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business

and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Authority, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority.

Effective Date and Duration of Certificate

"(g) Each certificate shall be effective from the date specified therein, and shall continue in effect until suspended or revoked as hereinafter provided, or until the Authority shall certify that operation thereunder has ceased, or, if issued for a limited period of time under subsection (d) (2) of this section, shall continue in effect until the expiration thereof, unless, prior to the date of expiration, such certificate shall be suspended or revoked as provided herein, or the Authority shall certify that operations thereunder have ceased: *Provided*, That if any service authorized by a certificate is not inaugurated within such period, not less than ninety days, after the date of the authorization as shall be fixed by the Authority, or if, for a period of ninety days or such other period as may be designated by the Authority, any such service is not operated, the Authority may by order, entered after notice and hearing, direct that such certificate shall thereupon cease to be effective to the extent of such service.

Authority to Modify, Suspend, or Revoke

"(h) The Authority, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*,

That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Authority, with an order of the Authority commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Authority to have been violated. Any interested person may file with the Authority a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Transfer of Certificate

"(i) No certificate may be transferred unless such transfer is approved by the Authority as being consistent with the public interest.

Certain Rights Not Conferred by Certificate

"(j) No certificate shall confer any proprietary, property, or exclusive right in the use of any air space, civil airway, landing area, or air-navigation facility.

Application for Abandonment

"(k) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the Authority, unless, upon the application of such air carrier, after notice and hearing, the Authority shall find such abandonment to be in the public interest. Any interested person may file with the Authority a protest or memorandum of opposition to or in support of any such abandonment. The Authority may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

Compliance With Labor Legislation

"(l) (1) Every air carrier shall maintain rates of compensation, maximum hours, and other working conditions and relations of all of its pilots and copilots who are engaged in interstate air transportation within the continental United States (not including Alaska) so as to conform with

decision numbered 83 made by the National Labor Board on May 10, 1934, not withstanding any limitation therein as to the period of its effectiveness.[15]

(2) Every air carrier shall maintain rates of compensation for all of its pilots and copilots who are engaged in overseas or foreign air transportation or air transportation wholly within a Territory or possession of the United States, the minimum of which shall be not less, upon an annual basis, than the compensation required to be paid under said decision 83 for comparable service to pilots and copilots engaged in interstate air transportation within the continental United States (not including Alaska).

(3) Nothing herein contained shall be construed as restricting the right of any such pilots or copilots, or other employees, of any such air carrier to obtain by collective bargaining higher rates of compensation or more favorable working conditions or relations.

(4) It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with title II of the Railway Labor Act, as amended.

(5) The term "pilot" as used in this subsection shall mean an employee who is responsible for the manipulation of or who manipulates the flight controls of an aircraft while under way including take-off and landing of such aircraft, and the term "copilot" as used in this subsection shall mean an employee any part of whose duty is to assist or relieve the pilot in such manipulation, and who is properly qualified to serve as, and holds a currently effective airman certificate authorizing him to serve as, such pilot or copilot.

Requirement as to Carriage of Mail

"(m) Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such

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[15] Para. (1) of Sec. 401 (l) was amended by act of April 29, 1942, 56 Stat. 265. The amendment was repealed by Act of July 25, 1947, 61 Stat. 449.

air carrier shall be entitled to receive reasonable compensation therefor as hereinafter provided.

Application for New Mail Service

(n) Whenever, from time to time, the Postmaster General shall find that the needs of the Postal Service require the transportation of mail by aircraft between any points within the United States or between the United States and foreign countries, in addition to the transportation of mail authorized in certificates then currently effective, the Postmaster General shall certify such finding to the Authority and file therewith a statement showing such additional service and the facilities necessary in connection therewith, and a copy of such certification and statement shall be posted for at least twenty days in the office of the secretary of the Authority. The Authority shall, after notice and hearing, and if found by it to be required by the public convenience and necessity, make provision for such additional service, and the facilities necessary in connection therewith, by issuing a new certificate or certificates or by amending an existing certificate or certificates in accordance with the provisions of this section.

Sec. 404(a), Civil Aeronautics Act, 52 Stat. 993, 49 U.S.C. 484(a) provides:

"SEC. 404 [*52 Stat. 993, 49 U. S. C. 484*] (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices, relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers."

Sec. 406, Civil Aeronautics Act, 52 Stat. 998, 49 U.S.C. 486, provides:

Rates for Transportation of Mail

Authority to Fix Rates

"SEC. 406 [*52 Stat. 998, 49 U. S. C. 486*] (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Rate-Making Elements

"(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and

quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

Statement of Postmaster General and Carrier

"(c) Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable. The Postmaster General shall introduce as part of the record in all proceedings under this section a comprehensive statement of all service to be required of the air carrier and such other information in his possession as may be deemed by the Authority to be material to the inquiry.

Weighing of Mail

"(d) The Postmaster General may weigh the mail transported by aircraft and make such computations for statistical and administrative purposes as may be required in the interest of the mail service. The Postmaster General is authorized to employ such clerical and other assistance as may be required in connection with proceedings under this Act. If the Authority shall determine that it is necessary or advisable, in order to carry out the provisions of this Act, to have additional and more frequent weighing of the mails, the Postmaster General, upon request of the authority, shall provide therefor in like manner, but such weighing need not be for continuous periods of more than thirty days.

Availability of Appropriations

"(e) Except as otherwise provided in section 405(k), the unexpended balances of all appropriations for the transportation of mail by aircraft pursuant to contracts entered

into under the Air Mail Act of 1934, as amended, and the unexpended balances of all appropriations available for the transportation of mail by aircraft in Alaska, shall be available, in addition to the purposes stated in such appropriations, for the payment of compensation by the Postmaster General, as provided in this Act, for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, between points in the continental United States or between points in Hawaii or in Alaska or between points in the continental United States and points in Canada within one hundred and fifty miles of the international boundary line. Except as otherwise provided in section 405(k), the unexpended balances of all appropriations for the transportation of mail by aircraft pursuant to contracts entered into under the Act of March 8, 1928, as amended, shall be available, in addition to the purposes stated in such appropriations, for payment to be made by the Postmaster General, as provided by this Act, in respect of the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, between points in the United States and points outside thereof, or between points in the continental United States and Territories or possessions of the United States or between Territories or possessions of the United States.

Payments to Foreign Air Carriers

"(f) In any case where air transportation is performed between the United States and any foreign country, both by aircraft owned or operated by one or more air carriers holding a certificate under this title and by aircraft owned or operated by one or more foreign air carriers, the Postmaster General shall not pay to or for the account of any such foreign air carrier a rate of compensation for transporting mail by aircraft between the United States and such foreign country, which, in his opinion, will result (over such reasonable period as the Postmaster General may determine, taking account of exchange fluctuations and other factors) in such foreign air carrier receiving a higher rate of compensation for transporting such mail than such foreign country pays to air carriers for transporting its mail by

aircraft between such foreign country and the United States, or receiving a higher rate of compensation for transporting such mail than a rate determined by the Postmaster General to be comparable to the rate such foreign country pays to air carriers for transporting its mail by aircraft between such foreign country and an intermediate country on the route of such air carrier between such foreign country and the United States."

Sec. 801, Civil Aeronautics Act, 52 Stat. 1014, 49 U. S. C. 601, provides:

The President of the United States

"Sec. 801 [*52 Stat. 1014, 49 U. S. C. 601*] The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of any certificate issuable under section 401 (e) or any permit issuable under section 402 (c) or to the original terms, conditions, or limitations of any such certificate or permit."

Sec. 1002(b), Civil Aeronautics Act, 2 Stat. 1018, 49 U. S. C. 642(b), provides:

"(b) The Authority is empowered at any time to institute an investigation, on its own initiative, in any case and as to any matter or thing concerning which complaint is authorized to be made to or before the Authority by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Authority shall have the same power to proceed with any

investigation instituted on its own motion as though it had been appealed to by complaint. "

Sec. 1006, Civil Aeronautics Act, 52 Stat. 1024, 49 U. S. C. 646, provides:

Orders of Authority Subject to Review

"Sec. 1006 [*52 Stat. 1024, 49 U. S. C. 646*] (a) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

"(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice of Authority; Filing of Transcript

"(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

Power of Court

"(d) Upon transmittal of the petition to the Authority, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Authority. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as

may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Authority.

Findings of Fact by Authority Conclusive

"(e) The findings of facts by the Authority, if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Certification or Certiorari

"(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Authority shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code. "

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 136

AIR TRANSPORT ASSOCIATES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The court of appeals did not render an opinion. The opinions of the Civil Aeronautics Board (R. 29, 38, 68) are not reported.

JURISDICTION

The order of the court of appeals was entered on February 18, 1952 (R. 162). The time within which to file a petition for a writ of certiorari was

extended to and including June 17, 1952, by order of the Chief Justice (R. 165). The petition for a writ of certiorari was filed on June 17, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether a court of appeals may properly dismiss a petition for review of a Civil Aeronautics Board order pertaining to overseas air transportation, which has been approved by the President pursuant to Section 801 of the Civil Aeronautics Act, where the entire record of the Board's proceedings is not before the court.

2. Whether an order of the Board certificating an air carrier for an overseas route pursuant to presidential direction under Section 801 of the Act is judicially reviewable.

3. Whether the failure of petitioner to urge objections to the Board's order before the Board bars judicial review of those objections, or whether reasonable grounds exist which excuse such failure.

4. In the event that the preceding questions are answered in the favor of petitioner, there is the further question presented as to whether, in the circumstances of this case, the Board erred in failing to consolidate petitioner's application for a certificate of public convenience and necessity with its general investigation into the adequacy of air service between the continental United States and Alaska.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act, 52 Stat. 973, as amended, 49 U.S.C. 401 *et seq.*, are set forth in the Appendix, *infra*, pp. 14-15.

STATEMENT

Petitioner is a non-certificated irregular air carrier which conducts operations between the continental United States and Alaska (Pet. for Rev., par. 2, R. 2). It seeks review of the dismissal by the court below of its petition for review of orders of the Civil Aeronautics Board certificating two air carriers to serve routes between the continental United States and Alaska.[1]

In March 1948, the Board instituted an investigation into the question of whether the then certificated airlines were providing adequate cargo service between Alaska and the continental United States (Order Serial No. E-1278, R. 38). Subsequently, various applications seeking authority to engage in the transportation of passengers,

[1] Petitioner operates under a Letter of Registration pursuant to a regulation of the Board exempting irregular air carriers holding such letters from the certification requirements of the Civil Aeronautics Act. In proceedings not related to the present case, petitioner's Letter of Registration has been ordered revoked by the Board for violation of the Board's regulations (Order Serial No. E-5723, dated September 21, 1951). This revocation order recently has been affirmed. *Air Transport Associates* v. *Civil Aeronautics Board* (C.A. D.C., Case No. 11260, decided July 10, 1952). Unless the Court should grant a possible petition for a writ of certiorari and thereafter reverse the judgment of the Court of Appeals, the present case presumably will become moot, since petitioner's standing to challenge the Board's present orders rest upon its status as a competitor of the successful applicants.

property and mail were consolidated into the investigation (R. 38).

A prehearing conference was held in May 1948, evidentiary hearings were held before an examiner during the last three months of that year, the examiner's report was filed in December 1949, and in October 1950 the Board submitted to the President a report and proposed order determining that Pacific Northern Airlines should be given a route between Anchorage and Seattle (R. 36). In May 1951, the President instructed the Board to enlarge Pacific Northern's proposed route to include Portland as a terminal, and also to certificate Alaska Airlines to operate a route with Fairbanks, Portland, and Seattle as terminals (R. 30). It is the orders of the Board issued pursuant to this presidential direction (R. 32) which are challenged in the present proceedings.

Petitioner was a party to and participated actively in the proceedings before the Board (*e.g.*, R. 101).[2] Five months after the completion of the hearings before the examiner, petitioner filed an application for a certificate of public convenience and necessity for routes which would be competitive with those involved in the proceedings before the Board (Pet. 5). Petitioner does not assert that it ever requested the consolidation of its ap-

[2] Although petitioner implies that it was prejudiced by the failure of the Board to grant its motion to intervene until after the close of the evidentiary hearings, the record of the Board's proceedings shows that petitioner was apprised at the outset of the hearings that it would be permitted to present an affirmative case as if its motion to intervene had been granted (Tr., p. 99).

plication into the proceedings, and the records of the Board reveal that no such application was filed. Petitioner's brief before the examiner (R. 101-118), which was filed several months after the examiner's report and nearly a year after the filing of petitioner's application for a certificate, failed to make any request that this application be consolidated. And although petitioner requested reopening of the hearings, there was no suggestion that it wished to urge its own application for a certificate at such hearings.[3]

Petitioner filed a petition for review in the court below attacking, on many grounds, the Board's orders herein (R. 1-29). A motion by petitioner for a stay was denied (R. 139). A motion to dismiss or affirm, and a motion for leave to file an abbreviated record, were filed by the Board (R. 137). A motion to dismiss was filed by intervenor Alaska Airlines Inc. (R. 149). After receiving briefs and hearing oral argument, the court below (Miller, Bazelon, and Washington, JJ.) unanimously dismissed the petition for review (R. 162).

[3] Petitioner states that it "has unsuccessfully requested early action" upon its application for a certificate of public convenience and necessity (Pet. 5). This statement is unsupported in the record before this Court. The record of the proceedings before the Board shows that petitioner did not request immediate hearing upon its application until 3 days after the release of the order which is challenged here. Moreover, petitioner made no effort to urge its application at any stage of the proceedings. Thus, at the oral argument before the Board, petitioner's president was asked why it had not filed an application to be heard in the proceeding. Petitioner's president indicated that the company was not, at the time of hearing, interested in obtaining a certificate (Tr., pp. 476, 477). No mention was then made of the application which petitioner had filed after the close of the hearings.

ARGUMENT

1. Petitioner incorrectly urges that the court below erred in dismissing the petition for review without having before it the entire record of the Board's proceedings (Pet. 16-17).

The motion to dismiss the petition for review was rested on jurisdictional grounds.[4] The motion presented a pure question of law—whether a court is empowered to review an order issued at presidential direction and with presidential approval under Section 801 of the Civil Aeronautics Act.[5] It is plain that a motion of this character can be and properly was decided without examination of the complete record of the Board's proceedings, because those proceedings were irrelevant to the determination of the question at issue. All the relevant facts and materials were brought before the court by petitioner in its petition for review of the Board's orders (R. 1-118).

The statutory requirement for the filing with the court of appeals of the record of proceedings

[4] The alternative motion to affirm was not granted by the court and is not at issue here.

[5] Section 801 (52 Stat. 1014, 49 U.S.C. 601) provides in pertinent part:

"The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof."

before the Board is obviously applicable only where the petition for review is heard on the merits. If it is dismissed for want of jurisdiction, the filing of the record becomes superfluous, at least where, as here, the want of jurisdiction appears clearly from the appellant's own papers. This Court has previously held that "the necessity of a record, and the extent thereof, in connection with a motion to dismiss or affirm" filed by an administrative agency in a statutory review proceeding, is a matter resting within the discretion of the court concerned. *American Power Co.* v. *Securities and Exchange Commission,* 325 U.S. 385, 392-3. The discretion to dispense with the record was appropriately exercised here, there is no conflict of decision, and the issue does not merit review by this Court.

2. Petitioner does not in terms ask this Court to review the holding, implicit in the dismissal order of the court below, that there is no judicial review of a Board order issued at the direction of and approved by the President pursuant to Section 801 of the Civil Aeronautics Act. It seems obvious, however, that petitioner's attacks upon the Board's orders cannot be considered unless there can be judicial review of those orders.

In *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U.S. 103, which the petition does not cite, it was held that when the President has acted pursuant to the authority conferred upon him by Section 801 and has approved an order of the Board, such order "emanates from

the President" and "is not susceptible of review by the Judicial Department" (333 U.S. at 112). Since the decision in the *Waterman* case, the courts have declined jurisdiction of cases in which presidentially approved orders of this character were challenged.[6]

Petitioner attacks the President's exercise of authority here upon the ground that the President is not empowered to direct the Board to issue a certificate to a carrier which the Board has not independently found to be qualified (Pet. 7, 18-21). But it was settled in the *Waterman* case, *supra*, that Section 801 confers more than a veto power. The Board's decision on matters subject to presidential approval under Section 801 serves merely "as a recommendation to the President" (333 U.S. at 109). The President controls the ultimate decision. His control "is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies" (*ibid.*).

This is not the first occasion since the *Waterman* decision that the President has exercised affirmative authority under Section 801 and the courts have declined review. In *Chicago and Southern Air Lines* v. *Civil Aeronautics Board*, a presiden-

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[6] *Alaska Airlines* v. *Civil Aeronautics Board* (C.A. D.C., Case No. 9498), petition for review dismissed for want of jurisdiction, April 22, 1948; *Chicago and Southern Air Lines* v. *Civil Aeronautics Board* (C.A. D.C., Case No. 10375), petition for review dismissed May 8, 1950, certiorari denied, 340 U.S. 829; *Trans World Airlines* v. *Civil Aeronautics Board*, 184 F. 2d 66 (C.A. 2), certiorari denied *sub. nom. Sparks* v. *Civil Aeronautics Board*, 340 U.S. 941.

tial order requiring the Board to certificate a carrier to perform air transportation which the Board had initially determined not to be required by the public interest was unsuccessfully attacked.[7] And in *Trans World Airlines* v. *Civil Aeronautics Board*, an order of the President which directed approval of a transfer of assets and a certificate from one carrier to another withstood challenge.[8] In the light of the terms of Section 801 and the decisions under it, it is clear that petitioner can derive no comfort from the recent steel seizure cases upon which it relies so heavily (Pet. 9-10).[9] Those cases dealt with an exercise of power by the President which was held not to have been conferred by any statute, but to be in the face of a contrary legislative mandate. Here, the President exercised a power specifically conferred upon him by statute, and the exercise of that power has been explicitly held to be judicially unreviewable.

There is likewise no basis for petitioner's further contention that a distinction should be drawn between "foreign" air transportation and "overseas" air transportation with respect to the power

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[7] Petition for review dismissed (C.A. D.C., Case No. 10375), May 8, 1950, certiorari denied, 340 U.S. 829.

[8] 184 F. 2d 66 (C.A. 2), certiorari denied *sub. nom. Sparks* v. *Civil Aeronautics Board*, 340 U.S. 941. The President also designated certain route changes in conjunction with the transfer.

[9] *Youngstown Sheet & Tube Co.* v. *Sawyer*, *Sawyer* v. *Youngstown Sheet & Tube Co.*, Nos. 744, 745, October Term, 1951.

of the President (Pet. 7, 21-22).[10] Section 801 in terms applies to both kinds of transportation, and neither the legislative history adverted to by petitioner nor any other legislative history of which we are aware suggests that the President's power as to one was intended to be greater or less than his power as to the other. Moreover, no such distinction has been suggested in the judicial decisions under the Section.[11]

The decision below is correct on this question, and there is no conflict.

3. Even if it be assumed that the regularity of Board proceedings leading to an order approved by the President under Section 801 might be subject to

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[10] Section 1 (21) of the Act (49 U.S.C. 401 (21)) defines "overseas air transportation" to include transportation between:

> a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States.

"Foreign air transportation" is defined in the same Section to include transportation between:

> a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

[11] The *Waterman* case involved transportation from continental United States to Puerto Rico via Cuba. The Court concluded "that orders of the Board as to certificates for overseas or foreign air transportation" are not reviewable (333 U.S. at 114). *Chicago & Southern Air Lines* v. *Civil Aeronautics Board* (C.A. D.C., Case No. 10375), certiorari denied, 340 U.S. 829, involved transportation from the continental United States to territories, as well as to foreign countries. And see *Alaska Airlines* v. *Civil Aeronautics Board* (C.A. D.C., Case No. 9489), petition for review dismissed for want of jurisdiction, April 22, 1948.

judicial examination, there is a further obstacle to the consideration of the alleged errors of the Board in the present case, since these purported errors were not properly brought to the Board's attention.

The proceeding for review of the Board's order was brought under Section 1006 of the Act. Subdivision (e) of that Section provides:

> * * * No objection to an order of the Authority [Board] shall be considered by the court unless such objection shall have been urged before the Authority [Board] or, if it was not so urged, unless there were *reasonable grounds* for failure to do so. [Emphasis supplied.]

The purpose of Section 1006 (e) is, of course, to afford the administrative agency an "opportunity to consider on the merits questions to be urged upon review of its order". *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U.S. 253, 256. It has been consistently held that Section 1006 (e) deprives the courts of jurisdiction to consider questions not raised before the Board. *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board,* 183 F. 2d 975 (C.A. D.C.); *New England Air Express* v. *Civil Aeronautics Board,* 194 F. 2d 894 (C.A. D.C.); *Western Airlines, Inc.* v. *Civil Aeronautics Board,* (C.A. 9, Case No. 13245, decided May 19, 1952).

Petitioner's effort to obtain judicial review of the failure of the Board to consolidate its application for a certificate of public convenience and necessity with the Board's general investigation

of service to Alaska (Pet. 17-18) is plainly barred by Section 1006(e). This objection was not urged before the Board; hence, it may not be urged before the courts.

There were no "reasonable grounds" for petitioner's failure to present its objections to the Board. Petitioner had repeated opportunities to request consolidation prior to the issuance of the Board's final order, but never did so. Moreover, petitioner could have filed a petition for reconsideration of that final order. The certificates of public convenience and necessity issued by the Board to Alaska Airlines and Pacific Northern Airlines were expressly made subject to the power of the Board to entertain petitions for reconsideration (R. 34, 35). And the Board's rules of practice (14 C.F.R. (Supp. to 1949 ed.) Sec. 302.11) provided that any party might petition for reconsideration of any final order of the Board.[12]

4. If it be assumed, *arguendo,* that petitioner has standing to attack the Board's failure to consolidate its application, the attack must nevertheless fail on the merits. It is true, of course, that opportunity must be granted for hearing mutually exclusive applications before either one is decided. *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U.S. 327. But this prin-

[12] In the past, the Board has upon reconsideration reversed, with the approval of the President, an order which it had previously entered with his approval. *Pacific Northwest-Hawaii Service Case,* 9 C.A.B. 414, approved July 29, 1948; *Pacific Northwest-Hawaii Service Case,* 9 C.A.B. 580, approved October 2, 1948.

ciple is obviously applicable only to applications which are pending at the time a mutually exclusive application is processed, and is certainly inapplicable where a late-filing applicant has previously participated actively in an area proceeding. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U.S. 572.[13] Therefore, even if it be assumed that the applications here were mutually exclusive, petitioner cannot be heard to complain of a failure of the Board to reopen the hearings to include an application filed some months after the hearings closed.[14]

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[13] *Northwest Airlines* v. *Civil Aeronautics Board*, 194 F. 2d 339 (C.A. D.C.), upon which petitioner relies, is plainly distinguishable from the case at bar. In the *Northwest* case, the petitioner's application was pending during the entire course of the proceeding as to which it was contended that there should have been consolidation. Moreover, there was a request by Northwest for consolidation which was held by the court to be timely under the particular circumstances of the case.

[14] *Ward* v. *Federal Communications Commission*, 108 F. 2d 486 (C.A. D.C.); *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 98 F. 2d 303 (C.A. D.C.); *Red River Broadcasting Company* v. *Federal Communications Commission*, 98 F. 2d 282 (C.A. D.C.), certiorari denied, 305 U.S. 625.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1952.

APPENDIX

Section 801 of the Civil Aeronautics Act (52 Stat. 1014, 49 U.S.C. 601) provides in part:

> The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority [Board] before hearing thereon, and all decisions thereon by the Authority [Board] shall be submitted to the President before publication thereof. * * *

Section 1006 of the Act (52 Stat. 1024, 49 U.S.C. 646) provides in part:

> (a) Any order, affirmative or negative, issued by the Authority [Board] under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such or-

der. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

(e) The findings of facts by the Authority [Board], if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority [Board] shall be considered by the court unless such objection shall have been urged before the Authority [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 314799

Office - Supreme Court, U. S.
FILED
JUL 18 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1952

No. 136

AIR TRANSPORT ASSOCIATES, *Petitioner*

v.

CIVIL AERONAUTICS BOARD, *Respondent*
ALASKA AIRLINES, INC., *Intervener*
PACIFIC NORTHERN AIRLINES, INC., *Intervener*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF INTERVENOR ALASKA AIRLINES, INC. IN OPPOSITION.

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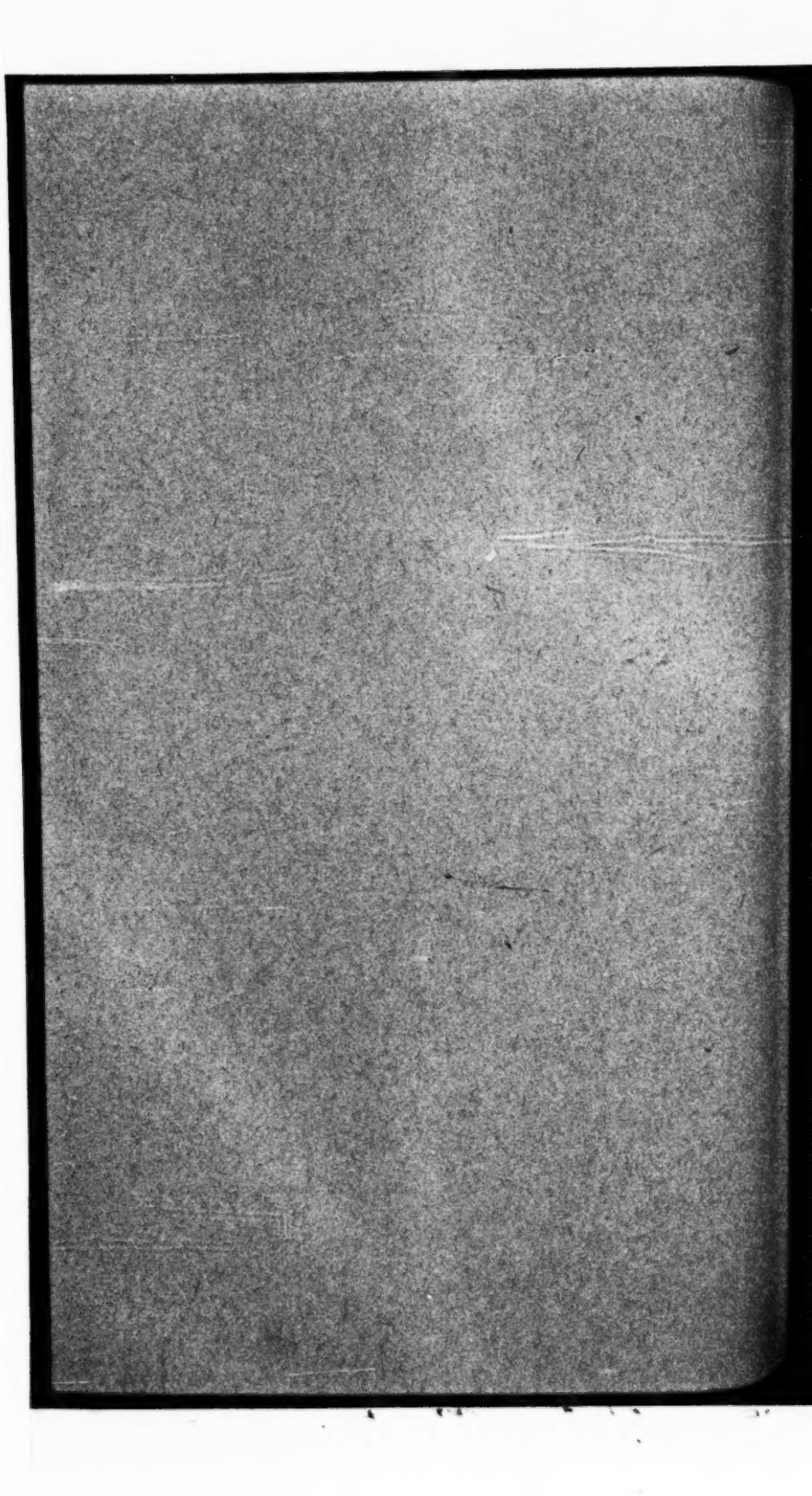

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF INTERVENOR ALASKA AIRLINES, INC. IN OPPOSITION.

OPINIONS BELOW.

The per curiam order of the United States Court of Appeals for the District of Columbia Circuit (R. 162) dismissing the Petition for Review of the order of the Civil Aeronautics Board (R. 29-32) has not yet been reported.

JURISDICTION.

The grounds upon which jurisdiction of this Court is invoked are set out in the Petition for Writ of Certiorari at page 2.

QUESTIONS PRESENTED.

1. Whether the holding of this Court in *Chicago and Southern Air Lines* v. *Waterman Steamship Corporation*, 333 U. S. 103 (1948) precludes judicial review of the order involved in this proceeding, which completely emanated from the President in that it only reflected a directive of the President contrary to the recommendation of the Board.

2. Whether a Court of Appeals may pass upon a Motion to Dismiss a Petition for Review of an order of the Civil Aeronautics Board for lack of jurisdiction without having before it a transcript of the entire record of the preceedings before the Board when the Petition for Review and five lengthy exhibits attached thereto contained all of the material pertinent to the issue raised by the Motion to Dismiss.

3. Whether, if over one year after the institution of a proceeding before the Civil Aeronautics Board to consider application for certificates of public convenience and necessity authorizing air transportation between the United States and Alaska, and after the close of the hearings therein, an additional application seeking such certificate is filed by one of the interveners which had participated in the proceeding, the Board is required to hear and pass upon such additional application prior to, or simultaneously with, the pending proceeding, particularly when such application cannot be considered mutually exclusive with those involved.

4. Whether judicial review of the objections to the Order of the Board which Petitioner now raises is precluded by the fact that they were not raised before the Board at any time as required by Section 1006(e) of the Civil Aeronautics Act, 49 U. S. C. 646(e), although there was ample oppor-

tunity to do so in the form of a Petition for Reconsideration to the Board as authorized by its Rules of Practice.

STATUTE AND RULE INVOLVED.

The pertinent statutory provisions are cited in Appendix A of the Petition for Writ of Certiorari. The pertinent Rules of Practice of the Civil Aeronautics Board are set out in Appendix A, *infra*, page 19.

STATEMENT.

The order which Petitioner seeks to set aside was issued in a proceeding which commenced on March 9, 1948, when the Civil Aeronautics Board on its own initiative issued an order instituting a proceeding to inquire into the matter of the adequacy of the air cargo services of the certificated carriers between Alaska and the continental United States. (R. 38). The following month the Board expanded the proceeding to embrace applications which sought certificates of public convenience and necessity for the carriage of persons, property, and mail between the same geographical areas including, *inter alia*, an application of Alaska Airlines and Pacific Northern Airlines for certificates between the United States and Alaska. (R. 38).

On May 9, 1949, after the hearings had been completed and briefs had been submitted to the Examiner, Petitioner filed an application for a certificate of public convenience and necessity between the United States and Alaska. It never sought consolidation of this application in the pending proceeding and contended for the first time with the Court below that its application should have been considered prior to, or simultaneously with, those in the pending proceeding.

Section 801 of the Civil Aeronautics Act, 49 U. S. C. 601, provides that the "issuance" or the "denial" of any certificate "authorizing an air carrier to engage in overseas or foreign air transportation . . . shall be subject to the approval of the President." Pursuant to this section of

the Act, the Board submitted a recommendation to the President that Pacific Northern Airlines should be awarded a certificate between the United States and Alaska and that all other applications including that of Alaska Airline should be denied. As stated in the Order for which review is sought herein (R. 30):

> "On May 18, 1951, the President advised the Board that after taking into account all of the considerations and factors relating to this matter peculiarly within the scope of the Executive, particularly the need for air transport services to Alaska arising directly out of national defense activities, and the direct contribution which the fullest development of Alaska would make to the national defense, he had concluded that the Board's decision should be approved with the following changes:
>
> 1. Pacific Northern Airlines, Inc. should be authorized to serve Portland, Oregon, as a coterminal point with Seattle, Washington; and
>
> 2. Alaska Airlines should be granted a route from the coterminal point, Seattle, Washington, and Portland, Oregon, to Fairbanks, Alaska, carrying passengers, property and mail."

Acting pursuant to this Presidential directive under Section 801 of the Act, the Board on May 24, 1951, entered its supplemental opinion and order (R. 29-32) and submitted it to the President who approved of it on May 25, 1951. It is this order carrying into effect a decision of the President which Petitioner seeks this Court to review.

By the terms thereof, the certificate granted to Alaska Airlines was to become effective sixty days after the date of its approval by the President (as in fact it did) unless such effective date was extended by order of the Board prior to such date either on the Board's own initiative or upon the filing of a petition for reconsideration of the Board's order of May 24, 1951. (R. 35). (Petitions for reconsideration are authorized by the Board's Rules of Practice as set out in Appendix A, *infra*.) Although such

petitions were filed by several of the other parties, the Petitioner herein failed to file any petition with the Board for reconsideration of the order complained of herein; and it did not at any time ask the Board to extend the effective date of the certificate or to consider the objection that the President had exceeded his statutory authority—a contention which has never been presented to the Board.

On July 23, 1951, Petitioner filed its Petition for Review with the United States Court of Appeals for the District of Columbia Circuit. (R. 1). On August 1, 1951, the Respondent, Civil Aeronautics Board, filed a motion with the Court, which, *inter alia*, requested the Court to dismiss the Petition for Review for want of jurisdiction on the grounds that an order of the Board approved by the President is not subject to judicial review in accordance with the decision of this Court in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103 (1948) (R. 137, 143). On the same date, the Respondent filed a motion with the Court for the entry of an order authorizing the Board to file an abbreviated transcript of the record for consideration in passing upon the above-mentioned motion. (R. 137). On August 24, 1951, the Intervenor, Alaska Airlines, Inc., filed a motion with the Court requesting it to dismiss the Petition for Review in its entirety for want of jurisdiction in accordance with the *Waterman Case*, or, in the alternative, for failure to allege errors subject to judicial review. (R. 149, 150). On February 18, 1952, the Court issued an order which recited that the Petition for Review had come before the Court "for hearing on Respondent's Motion to Dismiss or Affirm Forthwith, on the Motion of Alaska Airlines, Inc., Intervenor, to Dismiss, and on the Respondent's Motion for Leave to File an abbreviated transcript of record," and ordered that the Petition for Review be dismissed. (R. 162).

Although eighteen points of error were alleged in the Petition for Review of the order of the Civil Aeronautics Board (R. 7-10), the Petitioner, as indicated by its "Questions Presented," set forth in its Petition at pages 3 and 4,

has apparently elected to rely upon only two of them: That the Board should have considered Petitioner's application for a certificate of public convenience and necessity prior to, or simultaneously with, its decision in the proceeding before the Board, and that the President exceeded his statutory authority in directing the issuance of a certificate to Alaska Airlines. To these two alleged errors of the Civil Aeronautics Board, Petitioner has added an alleged error of the Court below in passing upon the motions to dismiss the Petition for Review without having available for inspection the entire record of the proceeding before the Board. (Petition, page 3).

ARGUMENT.

1. The President's Authority to Approve an Order of the Board Granting a Certificate for Overseas and Foreign Air Transportation was Exhaustively Considered by This Court in Chicago & Southern Air Lines v. Waterman Steamship Corporation, 333 U. S. 103 (1948). The Court of Appeals for the District of Columbia Circuit was Clearly Correct in Dismissing the Petition for Review Because the Waterman Case Precludes Judicial Review of an Order of the Board Approved by the President, Carrying Into Effect a Decision Made by Him.

It is somewhat surprising to find no mention whatsoever of the *Waterman Case* in the Petition for Writ of Certiorari when it was the primary ground upon which Respondent and Intervenor have sought dismissal of the Petition for Review. (R. 143, 150).

Petitioner presented to the Court below for review an order of the Board which is not only squarely within the holding of this Court in the *Waterman Case*, but represents an even stronger factual situation than was there presented. The *Waterman Case* held that an order of the Board subsequently approved by the President was not reviewable

since "whatever of the order emanated from the President is not susceptible to review by the judicial department." *Idem* 112. The order in that case coincided with a recommendation of the Board that Chicago & Southern Air Lines be certificated for a route in the Latin American Area. In the present case, however, the President disapproved of the recommendation of the Board, that the application of Alaska Airlines be denied and directed that a certificate be issued to it. The order which Petitioner complains of herein, therefore, *completely* "emanates from the President" since it reflects purely and simply the directive of the President which was contrary to the recommendation of the Board and is unquestionably within the scope of the *Waterman Case* holding such orders to be nonreviewable by the judicial department.[1]

Prior to considering the distinction which the Petitioner attempts to make between the facts in the instant case and the *Waterman* decision, it is necessary to correct Petitioner's consistent implication throughout its Petition for Writ of Certiorari to the effect that the Board found that Alaska Airlines "did not meet the standards prescribed by Congress as a prerequisite" to the issuance of a certificate. (Petition, pages 2, 4, 14, 21). In its original opinion submitted to the President as a recommendation, the Board found that the public convenience and necessity required the addition of another carrier between Seattle and Anchorage, Alaska, and then turned to a consideration of which carrier applicant should be awarded the certificate.

[1] All petitions for review of orders of the Board approved by the President carrying into effect a decision made by him filed since the *Waterman Case* have been dismissed on the basis thereof, even though, in each instance, the Petitioners strained to find distinctions. *Trans World Airlines, Inc.* v. *Civil Aeronautics Board*, et al., 184 F. 2d 66 (C.C.A. 2nd 1950), Cert. denied *sub. nom. Sparks* v. *Civil Aeronautics Board*, 340 U. S. 941 (1951); *Chicago & Southern Air Lines, Inc.* v. *Civil Aeronautics Board*, App. D.C. No. 10,375 (January 18, 1950); Petit. for Rehearing Denied (May 8, 1950); Cert. denied, 340 U. S. 829 (1950); Pet. for Rehearing Denied, 340 U. S. 885 (1950).

The Board did *not* find Alaska Airlines "unfit" in this proceeding to conduct this operation, however, as it did, for example in the case of another applicant, Mt. McKinley Airlines. (R. 53). All that the Board did was to consider the *relative* fitness of the Intervenor and the diversionary effect from a traffic standpoint of the authorization of the one carrier as opposed to the other, and recommended that Pacific Northern Airlines be authorized to operate the route between Seattle and Anchorage. It did *not* make any finding of the ultimate fitness or unfitness of Alaska Airlines to conduct air transportation between Seattle/Portland and Fairbanks, Alaska, which is the route the President directed the Board to award to Intervenor for reasons of national policy. In view of this fact, the only remaining contention contained in Petitioner's third "Question Presented" (Petition, page 4) is that the President designated the Intervenor to conduct the air transportation above described without the benefit of an ultimate finding by the Board as to its "fitness, willingness and ability."

This objection of the Petitioner that the President acted without a finding of "fitness" is squarely within the factual situation involved in the *Waterman Case* itself. One of the contentions raised on review there was that the Board had submitted a legally defective finding to the President of the fitness of the carrier which it recommended to the President for certification since the finding was not supported by substantial evidence. *Idem*, 117. This contention may or may not have been true, for this court never considered it on the merits and dismissed the charge with the holding that it did not have jurisdiction to consider the Petition for Review. If this Court in the *Waterman Case* decided that it did not have jurisdiction to review what might have been an inadequate, indeed, a possibly mistaken recommendation wrongly influencing the President's determination, it is impossible to see how Petitioner can now argue that jurisdiction exists to consider whether the lack of any recommendation at all on this point constituted defective procedure.

Of even more importance, however, is the fact that Petitioner's objection is fully within the scope of the two principles which the Supreme Court applied in the *Waterman Case* in considering the reviewability by the judicial department of an order of the Board approved by the President. This Court there determined that such orders embodied Presidential discretion as to matters beyond the competence of the courts to adjudicate, *Idem*, 114, and that to review such orders would be to render "an advisory opinion in its most obnoxious form." *Idem*, 113. The exhaustive treatment given these matters in the opinion should set at rest any contention that a factual variation such as Petitioner alleges in this case destroys the applicability of the *Waterman* doctrine.

In the *Waterman Case* this Court first analyzed the nature of air transportation required by Section 801 of the Civil Aeronautics Act to be approved by the President and recognized that aerial navigation routes and bases should be prudently correlated with facilities and plants for our national defense. *Idem*, 108. It concluded, therefore, that pursuant to this recognition Congress had provided for Presidential control which "is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies," *Idem*, 109, and was a type of control which has "long been held to belong in the domain of political power and not subject to judicial intrusion or inquiry." *Idem*, 111.

In the present case, the Board, in its explanatory opinion accompanying its order of May 24, 1951, stated that after it submitted to the President its decision in which it decided the application of Alaska Airlines should be denied, the President "advised the Board that after taking into account all of the considerations and factors relating to this matter peculiarly within the scope of the Executive, particularly the need for air transport services to Alaska arising directly out of national defense activities, and the direct contribution which the fullest development of Alaska would

make to national defense, he had concluded that the Board's decision should be approved" with the change that Alaska Airlines should be granted a route from Seattle/Portland to Fairbanks, Alaska. (R. 30). The Board reflected this directive of the President in an order subsequently approved by the President. This order granting a certificate to Alaska Airlines over which Petitioner now seeks judicial review, is therefore, based solely upon the President's judgment and fully falls within the recognition by this Court in the *Waterman Case* that the "judiciary has neither aptitude, facilities, nor responsibility" to handle such questions. *Idem*, 111.

This Court also applied the principle in the *Waterman Case* that the judicial department will not exercise jurisdiction over matters where it cannot with finality decide the issues present. On page 113 of its opinion, this Court said: "To revise or review an administrative decision which has only the force of a recommendation to the President would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigate, on a subject concededly within the President's exclusive ultimate control."

Assume that judicial review is taken in this case and Petitioner's contentions expressed in its Petition for Review are sustained. The Court below would remand the matter to the Board for further proceedings in accordance with its opinion, but anything which the Board did pursuant thereto would be subject to later Presidential approval, which this Court in the *Waterman Case* described as a "positive and detailed" control of the Board's action. The President therefore has the ultimate discretion to disregard any decision of the Court. Such a situation clearly falls within the scope of the *Waterman Case*, where this Court forcefully pointed out at page 113 of the opinion that "judgments within the powers vested in courts by the judiciary article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another department of the Government" and "if the President may

completely disregard the judgment of the court, it would only be because it is one the courts were not authorized to render." It is submitted, therefore, that the Court below is completely correct in its interpretation of the *Waterman Case* to cover the instant case. The contentions which Petitioner now raises do not present a distinguishing factual situation raising any important new issues which have not already been fully covered by the extensive treatment of this entire question in the *Waterman Case.*

Brief mention might be made of two other arguments which Petitioner seeks to use to distinguish this proceeding from the *Waterman Case.*

First of all, Petitioner appears to argue that the President's power in connection with "overseas air transportation" is more limited than it is in the case of "foreign air transportation". It then notes that this proceeding involves just "overseas air transportation" whereas the *Waterman Case* involved "foreign air transportation". Presidential approval, however, is required pursuant to Section 801 of the Civil Aeronautics Act for the issuance of certificates authorizing either *overseas or foreign air transportation*— whether the Petitioner considers this statutory language "unfortunate" or not. (R. 20). Indeed, it is clear from the concluding paragraph of the Court's opinion in the *Waterman Case* that this Court had no doubt that Presidential approval applied to overseas as well as foreign air transportation.

> "We conclude that orders of the Board as to certificates for *overseas* or foreign air transportation are not mature and therefore not susceptible to judicial review at any time before they are finalized by Presidential review. After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate." 333 U. S. 103, 114 (Italics supplied).

Moreover, the dissenting opinion specifically makes it clear that the holding of the majority applies to overseas air

transportation as, for example, between "Seattle and Juneau, Alaska." 333 U. S. 103, 117.[2]

Secondly, Petitioner seeks to find some support in the recent "*steel*" cases and alleges that they "probably" conflict with the decision of the Court below. *Youngstown Sheet and Tube Company, et al.* v. *Sawyer* and *Sawyer* v. *Youngstown Sheet and Tube Company, et al.*, 72 Sup. Ct. 863 (decided June 2, 1952). These cases are *completely* distinguishable in that there is no claim made herein that the President acted solely pursuant to any "inherent power". The President's action taken herein was pursuant to Section 801 of the Civil Aeronautics Act, which, as this Court pointed out in the *Waterman Case*, provides a "positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies." *Idem* 109. Indeed, as Mr. Justice Jackson pointed out in his concurring opinion in the "*steel*" cases at 72 S. Ct. 863, 871: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at a maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." Mr. Justice Jackson then cited the *Waterman Case* as an example of such "a wide definition of Presidential powers under statutory authorization." Intervenor submits that there is no inconsistency whatsoever between the "*steel*" cases and the decision of the Court below in this proceeding.

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[2] In the *Chicago & Southern Air Lines Case*, note 1, *supra*, the Court of Appeals for the District of Columbia Circuit dismissed on the basis of the *Waterman Case* a Petition for Review (and this Court twice denied certiorari) of an order of the Board approved by the President involving a certificate embracing both overseas and foreign air transportation. Furthermore, Petitioner there unsuccessfully made the same argument as the Petitioner here repeats that the President did not have authority to designate a carrier to render air transportation without the benefit of a finding of its "fitness, willingness, and ability" by the Board.

2. The Court of Appeals for the District of Columbia Circuit was Correct in Passing Upon the Motions to Dismiss the Petition for Review for Lack of Jurisdiction Without Having Before it the Entire Record of the Proceeding Before the Civil Aeronautics Board in Accordance with the Decision of This Court in American Power Co. v. Securities and Exchange Commission, 325 U. S. 385 (1945).

Section 1006(c) of the Civil Aeronautics Act, 49 U.S.C. 646(c) requires the Board to certify and file in the court a transcript of the record upon which the order complained of was entered. This Court has held, however, in connection with identical language in Section 24(a) of the Public Utility Holding Co. Act, 15 U. S. C. 79x(a), that "the necessity of a record, and the extent thereof, in connection with a motion to dismiss or affirm" filed by an administrative agency in a statutory review proceeding is a matter resting within the discretion of the Court concerned. *American Power Co.* v. *Securities and Exchange Commission*, 325 U. S. 385, 392, 393 (1945). Thus in *Okin* v. *Securities and Exchange Commission*, 143 F. 2d 943 (C. C. A. 2nd 1944) the Court there held that it could grant a motion to dismiss for lack of jurisdiction on the basis of the pleadings filed and without any of the record of the proceeding before the Securities and Exchange Commission being certified. In *Chicago & Southern Air Lines* v. *Waterman Steamship Corporation*, both the Court below, 159 F. 2nd 828 (C. C. A. 5th 1947), and this Court, 333 U. S. 103 (1948) considered upon a skeleton record a motion to dismiss a Petition for Review of an order of the Civil Aeronautics Board approved by the President on the grounds of a lack of jurisdiction. In the *Waterman Case*, incidentally, the Petitioner there, as did Petitioner below, alleged a lack of substantial evidence to support findings. 333 U. S. 103, 117.

Both the Respondent and the Intervenor filed Motions to Dismiss the Petition for Review with the Court below on

the grounds that the Court did not have jurisdiction to review the order of the Board approved by the President granting the Intervenor a certificate of public convenience and necessity on the authority of this Court's decision in the *Waterman Case.* (R. 137, 143, 150). The Court below, in dismissing the Petition for Review, apparently did not even require the "abbreviated record" which the Respondent lodged with the Clerk since it never authorized the filing thereof. (R. 162). The material contained in the Petition for Review itself (including five lengthy appendices attached thereto (R. 29-118A) contained sufficient information upon which the Court could act for purposes of dismissal.

Accordingly, Intervenor submits that the question presented by Petitioner has been decisively considered in the *American Power Co.* and *Waterman Cases* and does not require review by this Court.

3. The Doctrine of Ashbacker Radio Corporation v. Federal Communications Commission, 326 U. S. 327 (1945) Does not Require the Civil Aeronautics Board to Hear and Pass Upon an Application Filed Over One Year After the Institution of a Pending Proceeding in Which Similar Applications are Being Considered, and After the Close of the Record Therein, Prior to, or Simultaneously With, the Decision in Said Proceeding, Particularly When the Application is Not Mutually Exculsive With Those Being Considered.

Petitioner's application for a certificate of public convenience and necessity was filed on May 9, 1949—over one year after the over-all proceeding in which the Board was considering applications for the U. S.-Alaska service had been instituted and after briefs had been filed with the Examiner. It could have filed this application as early as a year before, in May of 1948, when it was incorporated and the Board had just issued orders outlining the scope of the U. S.-Alaska proceeding. (R. 2, 3).

Petitioner is now contending for a truly startling interpretation of the *Ashbacker Case* which held that two mutually exclusive applications for a radio construction permit from the F.C.C., neither of which had been acted upon, must both be considered prior to the grant of either application. Petitioner urges that case as having required the Board to consider its application prior to, or simultaneously with, a pending proceeding which had already advanced beyond the stage of hearings and briefs to the Examiner! Were the *Ashbacker Case* to go so far, of course, it would wrought complete havoc in all administrative proceedings. All that a party need do in order to delay the disposition of any pending proceeding would be to wait until after hearings had been completed and briefs filed with the Examiner (as here), file an application which it contends is "mutually exclusive", and then require the administrative agency to hear its particular application before rendering a decision in the pending proceeding!

Furthermore, Petitioner has alleged without any support whatsoever in its Petition for a Writ of Certiorari that the application which it had on file with the Board was "mutually exclusive" and, therefore, under the doctrine of the *Ashbacker Case,* should have been considered prior to, or simultaneously with, the pending proceeding. Apparently Petitioner is of the opinion that any application involving a request for a certificate of public convenience and necessity from the Board authorizing air transportation between the same points in another application presently being considered by the Board is, automatically, "mutually exclusive" therewith. This is not true at all and does not even approach the situation in the *Ashbacker Case* where it was apparent that there was only room for one radio station because two stations would cause "intolerable interference" with each other. 326 U.S. 327, 331. Thus, if there may be room for ten air carriers, for example, between the United States and Alaska and there is one application presently being processed by the Board, another

applicant cannot allege that his application must be considered prior to or simultaneously with the pending application simply because it involves service between the same pair of points.

The Board has never indicated anywhere that there is a permanent "limit" to the number of air carriers who will be authorized to conduct air transportation between the United States and Alaska. In 1946 in the *Pacific Case*, 7 C.A.B. 209, the Board certificated Northwest Airlines between the United States and Alaska in addition to the already existing carrier, Pan American Airways, but stated that "an additional carrier can be authorized at any time and the Board can and will act promptly if the existing services prove inadequate." (R. 41). In the interim between the *Pacific Case* and this proceeding, the Board issued "exemption" orders authorizing additional carriers to conduct air transportation between the United States and Alaska. (R. 42). In the proceeding below the Board added two more certificated carriers between the United States and Alaska—Pacific Northern Airlines and Alaska Airlines. (R. 33, 34). But this does not mean that Petitioner is forever excluded from receiving a certificate authorization. Indeed, it, along with some 20 other applicants, are seeking limited certificate authorization between the United States and Alaska right now from the Board in a proceeding entitled the *"Investigation of Services by Large Irregular Carriers and Irregular Transport Carriers,"* Docket No. 5132. Furthermore, as the Board recited in the order of the Board (R. 31), the President expressed his desire to have the problem of the extent and the character of U. S.-Alaska air services carefully reviewed prior to 1953 when the existing temporary certificates of Northwest Airlines, Pacific Northern Airlines, and Alaska Airlines expire and "to initiate and carry forward to completion as promptly as possible a study to develop a proposed plan for the continuation of air transport services for Alaska of the character and extent needed to meet the requirements of Alaska and of the national interest." In such

a proceeding Petitioner can then argue that it, too, should be certificated or that it should be certificated in place of one of the existing carriers whose authorization is up for renewal.

Intervenor submits, therefore, that Petitioner's demand that its application for a certificate between the U. S. and Alaska, filed one year after the institution of a proceeding before the Board and after hearings have been completed and briefs submitted to the Examiner, where there has been no declaration as to the limit of the number of U. S.-Alaska carriers, is such a far cry from the physical exclusivity existing between the applications in the *Ashbacker Case*, as not to raise an issue requiring review of this Court.

4. Judicial Review of the Contention Which Petitioner Now Raises as to the Extent of the President's Authority Pursuant to Section 801 of the Civil Aeronautics Act is Precluded by the Fact That it Was Never Raised Before the Board at any Time as Specifically Required by Section 1006(e) of the Civil Aeronautics Act.

Section 1006(e) of the Civil Aeronautics Act which is set forth in full on page 36 of the Petition for Writ of Certiorari, provides in part:

> "No objection to an order of the (Board) shall be considered by the Court unless such objection shall have been urged before the (Board) or, if it was not so urged, unless there were reasonable grounds for failure to do so."

This Court has declared that compliance with the provision of this type in statutes dealing with judicial review of administrative action is a prerequisite to judicial review. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 256 (1943).

Petitioner is now seeking review of the order of the Board on the grounds, *inter alia*, that the President exceeded his statutory authority under Section 801 of the

Act. Although this contention could not have been made prior to the issuance of the final order of the Board which represented final action of both the President and the Board, Petitioner had ample opportunity thereafter to do so in the form of a Petition for Reconsideration of the order as specifically provided for in the Board's regulations. (See Appendix A). Petitioner did not file any Petition for Reconsideration and is therefore presenting this contention to the Court below for the first time in patent contravention of the provisions of Section 1006(e) cited above.

CONCLUSION.

WHEREFORE, for the reasons stated above, Intervenor, Alaska Airlines, prays that this Honorable Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia, filed by the Petitioner, Air Transport Associates, Inc.

Respectfully submitted,

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Dated: July 18, 1952

APPENDIX A.

Section 302.11 of the Civil Aeronautics Board's Rules of Practice in Economic Proceedings, 14 C.F.R. 302.11 [1]

Petition for rehearing, reargument, or reconsideration—(a) *Parties.* Any party may petition for rehearing, reargument, or reconsideration of any final order by the Board in a proceeding, or for further hearing before decision by the Board.

(b) *Contents of petitions.* (1) The matters of record claimed to have been erroneously decided must be specified, and the alleged errors, and the grounds relied upon must be briefly and specifically stated in the petition.

(2) If a final order of the Board is sought to be vacated or modified by reason of matters which have arisen since the hearing, or of a consequence which would result from a compliance therewith, or both, the new matter, the resulting consequence, or both, which are relied upon by the petitioner must each be set forth in the petition. Where the petition is based wholly or in part upon new matter, the petition must contain a statement that the petitioner, with due diligence, could not have known or discovered the new matter prior to the time of the hearing.

(3) The petition must set forth a brief statement of the relief sought by the petitioner and conform to requirements of § 285.3.

(c) *Filing and service of petitions.* Such petition for rehearing, reargument, or reconsideration, must be filed within thirty days after service of the order sought to be vacated or modified. After the expiration of said thirty days, such a petition may be filed only by leave of the Board granted pursuant to formal application upon a showing of reasonable grounds for failure to file the petition within the

[1] Effective April 28, 1952 this Section was substantially revised but retained the provision for filing Petitions for Reconsideration 30 days after service of the order sought to be vacated or modified. 14 C. F. R. 302.37.

prescribed thirty-day period. Any such petition or application shall be served by the petitioner or applicant upon all parties to the proceeding or their attorneys of record.

(d) *Stay of orders.* No petition for rehearing, reargument, or reconsideration filed in accordance with this section, or the granting thereof, shall operate as a stay of the effective date of the final order sought to be modified or vacated by such petition, unless specifically so ordered by the Board.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 136

AIR TRANSPORT ASSOCIATES, INC.,
Petitioner,

vs.

CIVIL AERONAUTICS BOARD,
Respondent

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

The court below dismissed petitioner's application challenging the legality of certain orders of the Civil Aeronautics Board, but rendered no opinion setting forth the reasons for its action. Respondent and intervenor in their briefs in opposition filed herein set forth certain arguments in support of the action of the court below, which are answered in the following order:

1. It was necessary for the court below to have the entire record of the Board's proceedings before it at the time it dismissed the petition for review. In failing to file it the Civil Aeronautics Board disobeyed the statutory directive to certify and file in that court the record of such proceedings which was relevant to a determination of the questions in issue.

2. The decision of this court in *Chicago and Southern Airlines, Inc.*, v. *Waterman Steamship Corporation*, 333 U. S. 103, does not preclude judicial review of these orders.

3. Objections not urged before the Board can be considered as the futility of objecting was obvious. Hence, reasonable grounds for not objecting existed under Section 1006(c) of the Civil Aeronautics Act.

4. The decision of the court below was contrary to and conflicts with the decision of this court in *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327.

A discussion of these four points follows.

1. The first point in respondent's brief and the second point in the brief of intervenor seek to justify the action of the court below in the absence of the record being filed in that court, as required by section 1006(c) of the Civil Aeronautics Act; 49 U.S.C. 646(c).[1] Respondent and the intervenor take the position that the necessity of a record is a matter resting within the discretion of the court concerned, citing *American Power Co.* v. *Securities and Exchange Commission*, 325 U. S. 385, 392-3.

That case is distinguishable factually. There, the Commission, before filing a certified copy of the transcript of the record upon which the order complained of was entered, moved to dismiss upon the ground that petitioner was not a "person or party aggrieved" within the meaning of 15 U.S.C.A., 79x(a),[2] and that objection to the order was

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[1] Sec. 1006(c) of the Civil Aeronautics Act, 49 U.S.C. 646(c) provides:

"A copy of the petition shall, upon filing, be forthwith transmitted to the Authority by the clerk of the court; and the Authority shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered."

[2] 15 U.S.C. 79x(a) provides:

"Court review of orders. (a) Any person or party aggrieved by an order issued by the Commission * * * may obtain a review of such

frivolous. The Circuit Court of Appeals in that case denied the Commission's motion to dismiss, and this court affirmed. However, in the instant case, the Board's motion to dismiss was granted. Accordingly, that cause is not controlling here.

This court in reviewing the action of the court below in dismissing the petition for review assumes the correctness of the allegations of the petition for review, (R. 1-29) in determining whether an agency may disobey a statutory directive to certify and file in the court below a transcript of the record and simultaneously move successfully to dismiss a petition challenging the regularity and validity of proceedings, lack of substantial evidence of the requirements and standards established by Congress and violation of the Administrative Procedure Act, which resulted in the issuance of the orders here sought to be reviewed.

2. Respondent and the Intervenor in effect urge that, admitting these allegations, still the court below was without jurisdiction because of the decision of this court in the case of *Chicago and Southern Airlines* v. *Waterman Steamship Corporation,* 333 U. S. 103.

Respondent and Intervenor comment that petitioner did not mention this case in its brief. It was not mentioned because petitioner did not and does not believe it controls the proper disposition of this case. It is readily distinguished factually.

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order in the United States court of appeals * * * by filing in such court * * * a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered."

The instant case differs from that case in the following particulars:

(a) The principle announced by this court in the case of *Ashbacker Radio Corporation* v. *Federal Communications Commission,* 326 U. S. 327, is not involved in that case, but is involved here. There was no requirement by the Civil Aeronautics Board at the time petitioner filed its application for a certificate of public convenience and necessity (R. 27) that required such application to be filed at any particular time or that required petitioner to file a motion to consolidate. It was not until September 15, 1952, that the Procedural Regulations of the Civil Aeronautics Board required a motion to consolidate to be filed prior to the date of hearing (Amendment No. 3 to Part 302, Civil Aeronautics Board Regulations Serial No. PR 17, adopted August 11, 1952, effective September 15, 1952).[3] In the absence of such a provision in its procedural regulations, it is evident that there was no reason for the Civil Aeronautics Board to exclude and not consider an application which was pending for over two years prior to the issuance of the order in this case. Under the principle established by this court in the *Ashbacker* case, it is clear that petitioner's application should have been considered.

(b) A reading of this court's opinion in the case of *Chicago and Southern Airlines* v. *Waterman Steamship Corporation,* 333 U. S. 103, which involves both overseas and foreign transportation, whereas the instant case involves only "overseas" transportation, indicates that this

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[3] This amendment provides:

"Section 302.12—Consolidations. • • • (b) *Time for filing.* A motion to consolidate or contemporaneously consider an application with any other application shall be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested, and shall relate only to a then pending application. • • •"

court based its decision upon the fact that foreign transportation was involved in that case. Particular reference is made to that part of this court's opinion appearing on page 109. However the order sought to be reviewed in the instant case involves only overseas transportation between the United States and Alaska, one of its territories, and therefore no problem is here presented involving the foreign policy of the United States. The "overseas" air transportation between the States and Alaska which is the subject of this proceeding does not involve such international delicacy or other consideration as to preclude court review.

While it is true that Section 801 of the Civil Aeronautics Act, 49 U. S. C. 601, requires applications for certificates of public convenience and necessity to engage in overseas [4] and foreign [5] transportation to be submitted to the President before publication, and their issuance is subject to his approval, nevertheless only words "in respect of any foreign air carrier subject to the approval of the President as provided in Section 801" of the Act are exempt from judicial review. As the orders in the instant case do not relate to foreign air transportation they are not so exempt.

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[4] The transportation in question was between Seattle, Washington, and points in Alaska, and constituted "overseas air transportation"; defined by Sec. 1(21)(b) of the Civil Aeronautics Act (49 U.S.C. 401) as transported between:

> "• • • a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Terrritory or possession of the United States; • • •."

[5] Sec. 1(21)(c) of the Civil Aeronautics Act, 49 U.S.C. 401, defines "foreign air transportation" as transportation between "• • • a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation • • •."

(c) Petitioner challenges the regularity of the proceedings in the instant case as follows: (1) "Prejudicial error" as defined by Section 10(e) of the Administrative Procedure Act, 5 U. S. C. 1009(e), (2) inadequacy of hearing and (3) incompatibility of the orders with the criteria or standards prescribed by Section 401(d) of the Civil Aeronautics Act, 49 U. S. C. 481(d). In the *Waterman* case the proceedings were not so challenged.

(d) To hold that the decision of this court in *Chicago and Southern Airlines, Inc.* v. *Waterman Steamship Corporation, supra,* prevents judical review of the Board's order would be to ignore the following provisions of Section 1006(a) of the Civil Aeronautics Act, 49 U. S. C. 646:

> "*Any order,* affirmative or negative, issued by the Authority under this Act, *except any order in respect of any foreign air carrier* subject to the approval of the President as provided in section 801 of this Act, *shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia* upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore." (Italics supplied)

To hold that the court below was without jurisdiction in this case, as uged by respondent and the intervenor would require this court to ignore the above provisions of the statute, or to interpolate into it a provision which it does not contain. This would amount to assuming the function of the legislature, and is beyond the limits of the law which are the boundary of the court's authority. As was said by

this court in *Bates* v. *Brown*, 72 U. S. 710, 718, 5 Wall. 710, 18 L. ed. 535:

> "• • • The intention of the legislature constitutes the law. That intention is manifested alike by what they have said and what they have omitted to say. Their language is our guide to their meaning, and under the circumstances we can recognize none other. We cannot go farther than they have gone. The plaintiff in error asks us, in effect, to interpolate into the statute a provision which it does not contain. Were we to do so, we should assume the function of the legislature and forget that of the court. The limit of the law is the boundary of our authority, and we may not pass it."

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive." *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 617, 88 L. Ed. 1488, 64 S. Ct. 1215, 153 A. L. R. 1007.

> "• • • The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws." *United States* v. *First National Bank*, 234 U. S. 245, 260, 58 L. Ed. 1298, 34 S. Ct. 846.

3. Objections not urged before the Board may, contrary to the argument announced by respondent and intervenor, be considered by the court because it would have been futile for petitioner to have objected to the Board's order issued at the direction of the President, obviously it would have been a useless gesture and vain procedure for petitioner to attempt to persuade the Board to act contrary to their specific instructions from the President. This is respect-

fully submitted, constituted "reasonable grounds" within the meaning of Sec. 1006(e)[6] of the Civil Aeronautics Act for not urging these objections to the Board.

4. The existence of a situation similar to that presented in the case of *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327, exists in the instant case as the application of petitioner and the airlines that were granted certificates in this proceeding were for authority to serve the same points and were therefore mutually exclusive. Here the Board *waited two years* after petitioner filed its application for a certificate before issuing its final order. The failure of the Board to consolidate petitioner's application and consider it simultaneously with that of the two carriers receiving certificates in this proceeding was a denial of petitioner's right to procedural due process, which would have been avoided if the Board had set petitioner's certificate for hearing, considered petitioner's qualifications and then weighed and compared them with those of the two airlines that were granted a certificate in the order under review.

Petitioner was not required to do more than file its application, was not advised either directly or indirectly that it was necessary to do anything further in order to have the Board consider its pending application, of which the Board was on notice. It was not until September 15, 1952, that the Procedural Regulations of the Civil Aeronautics Board were amended to place the requirement of seeking consolidation of a particular application with another pending application upon the applicant. Effective that date, Section 302.12 of the Civil Aeronautics Board's Procedural

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[6] Sec. 1006(e) of the Civil Aeronautics Act, 49 U.S.C. 646(e), provides: "• • • No objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority, *or, if it was not so urged, unless there were reasonable grounds for failure to do so.*" (Italics supplied)

Regulations was amended, placing this responsibility upon an applicant.[7] It was only from and after this regulation was adopted that applicants were required to take further action after filing an application for a certificate in order to get the Board to act on it. In order to properly charge petitioners with this duty it became necessary to so provide by regulation. But this regulation only became effective on September 15, 1952. It did not exist when their case was under consideration by the Board. Hence the responsibility rested with the Board to consider petitioner's application before completing its final action in this case during the two years that passed after petitioner's application was filed and before the Board acted upon these mutually exclusive applications for authority to serve the same points.

It will be observed that this proceeding transpired over the same period that a similar situation existed in the case of *Northwest Airlines* v. *Civil Aeronautics Board*, 194 Fed. (2d) 339, where the action of the Board was reversed due to the fact that (as stated by the court at page 346) it failed "to follow its *usual procedure* of hearing these conflicting applications in a single proceeding or of ruling on them simultaneously." (Italic supplied)

[7] Amendment No. 3 to Part 302 of the Procedural Regulations of the Civil Aeronautics Board, Regulations Serial No. PR-17, effective September 15, 1952, provides:

"Section 302.12—*Consolidations.* (a) The Board, upon its own initiation or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. Although the Board may, in any particular case, consolidate or contemporaneously consider two or more proceedings on its own motion, the burden of seeking consolidation or contemporaneous consideration of a particular application shall rest upon the applicant and the Board will not undertake to search its docket for all applications which might be consolidated or contemporaneously considered."

Conclusion

Notwithstanding the arguments advanced by respondent and the intervenor, it is respectfully submitted that because of the failure of the court below to properly apply the decision of this Court in *Ashbacker Radio Corp.* v. *Federal Communications Commission, supra,* the failure of the court below to properly construe the applicable statutes and the importance of obtaining a decisive ruling by this Court on this important matter, the court should grant the writ as prayed here.

Respectfully submitted,

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